United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

w/affidavit

74-1160

To be argued by
V. Pamela Davis

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1160

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P/S

DAIRYLEA COOPERATIVE, INC.,
Plaintiff-Appellant,

—v.—

EARL L. BUTZ, Secretary of the Department of Agriculture of the United States,
Defendant-Appellee,

—v.—

PENNMARVA DAIRYMEN'S COOPERATIVE FEDERATION, INC.,
Intervenor-Appellee.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR DEFENDANT-APPELLEE

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BRIEF FOR DEFENDANT-APPELLEE

Statement

The plaintiff-appellant Dairylea Cooperative, Inc. (Dairylea") appeals from a judgment entered in the United States District Court for the Southern District of New York on November 19, 1973 which dismissed Dairylea's complaint.

Dairylea brought this action for review of the validity of certain aspects of Middle Atlantic Milk Order 4 (7 C.F.R. 1004.1 *et seq.*) ("Order 4") promulgated by defendant-appellee Earl L. Butz, Secretary of the Department of Agriculture ("the Secretary") pursuant to the Agricultural

Marketing Agreement Act of 1937 ("the Act"), 7 U.S.C. 601 *et seq.**

This Act is a unique regulatory scheme which is directed, *inter alia,* at the price which must be paid to the producer of milk by the middle-man or milk "handlers". The purpose is the creation of an orderly market for the dairy industry.

The Act does not reach the retail sale of milk; it is concerned solely with the initial steps of milk marketing, the sale of raw, fluid milk to handlers by dairy farmers or "producers". Under the Act, the producer has no control over what the handler does with the milk; over whether the handler sells the milk to a manufacturer of dairy products, which traditionally yields a low price, or to a distributor of fluid milk for a higher price. The ultimate use and consequent price paid for his particular milk need not concern the producer since the Act requires that the handler pay a uniform price to all its producers of milk in a particular geographic region or "market".

The calculation of this uniform price and the individual adjustments which may be made to it are governed generally by the Act and specifically by an order promulgated pursuant to the Act. The Orders apply to specific geographic markets and may utilize any of several different approaches to pricing which are authorized by the Act. The promulgation procedure for an Order includes a referendum among the producers affected by it (7 U.S.C. 608c(9), (19)). The price structure determined by each Order is administered by a Market administrator appointed by the Secretary of Agriculture.

The New York-New Jersey area is governed by Order 2 (7 C.F.R. 1002.1 *et seq.*); the Middle Atlantic Area is

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* The relevant portions of this Act are reproduced in the Appendix to Appellant's brief.

governed by Order 4 (7 C.F.R. 1004.1 *et seq.*). Plaintiff Dairylea is a cooperative association which, among other functions, is a handler. Its members are producers on behalf of whom it markets milk under both Order 2 and Order 4 (JA 301).* Intervenor-Appellee Pennmarva Dairymen's Cooperative Federation, Inc. ("Pennmarva") is also a cooperative,** whose producers market largely under Order 4 (JA 24).

In 1970, three marketing areas covered by three different Orders were merged and Order 4 was promulgated. In 1972, Dairylea began to increase the amounts of milk it marketed in Order 4. That milk and the price that was paid for it pursuant to Order 4, specifically section 1004.92, is the subject of this action.

Dairylea contends that section 1004.92 is invalid because:

1) it violates specific provisions of the act;

2) it is not supported by the decision of the Secretary; and

3) the decision of the Secretary is not supported by the promulgation record.

The Secretary maintains that the challenged section is fully authorized by the Act and supported by substantial evidence in the record. He further argues that the District Court lacked jurisdiction over the subject matter of this action because of appellant's failure to exhaust its administrative remedies.

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* JA refers to the Joint Appendix.

** Actually, Pennmarva is itself composed of three other cooperatives whose members are, in turn, individual producers of milk (JA 24).

Issues Presented

1. Did the District Court err in accepting jurisdiction over the subject matter of the action despite Dairylea's failure to exhaust its administrative remedy?

2. Does Order 4's base-excess plan violate the provisions of the Act?

3. Was the promulgation of the base-excess plan a reasoned decision, supported by substantial evidence in the record of the promulgation procedure?

The Statute and the Order

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. § 601 *et seq.*), succeeded the Agricultural Adjustment Act of 1933, as amended in 1935. The prior act had been enacted in the wake of the ruinous and chaotic competitive conditions that had become rampant in the milk industry during the depression years. Those conditions and the factors which render economic regulation of the milk industry imperative have been vividly described in *Nebbia* v. *New York,* 291 U.S. 502, 516-518 (1934), and *United States* v. *Rock Royal Co-op.,* 307 U.S. 533, 549-550 (1939).

The constitutionality of the Act was initially considered and upheld by the Supreme Court in *United States* v. *Rock Royal Co-op., supra,* and in *H. P. Hood & Sons* v. *United States,* 307 U.S. 588 (1939).

The Act empowers the Secretary of Agriculture to promulgate marketing agreements and orders regulating the handling of specified agricultural products, including milk, in various marketing areas. 7 U.S.C. 608c 1-4. Milk orders are issued only after notice is given to affected industry members of public rulemaking proceedings which

are thereafter held. (7 U.S.C. 608c (3)). The hearing is presided over by an administrative law judge; sworn testimony and documentary evidence is received; and interested parties are given an opportunity to file briefs. The Secretary, upon consideration of the record of the hearing and the briefs filed, issues a recommended decision. Interested parties are permitted and encouraged to file exceptions to the recommended decision; and after considering the exceptions, the Secretary files his final decision in which he advises the industry of the exact terms and provisions of the order he is prepared to issue to regulate milk handling in the area to be regulated.* A referendum is then conducted to determine whether affected producers approve of the proposed order. If either two-thirds or more of the producers to be affected approve the order, or if approval of the order is received from producers producing two-thirds or more of the volume of the milk in the market, the Secretary issues the order (7 U.S.C. 608c(8)(9), (19)). Milk handlers are thereafter subject to its terms.

The provisions that an order pertaining to milk may contain are set forth in the Act (7 U.S.C. §§ 608c(5) and (7)).

In structuring a milk order, the Secretary has to cope with the economics of the milk industry, succinctly described in *Zuber* v. *Allen*, 396 U.S. 168 at 172-3 (1969):

> The two distinctive and essential phenomena of the milk industry are a basic two-price structure that permits a higher return for the same product, depending on its ultimate use, and the cyclical characteristic of production.
>
> Milk has essentially two end uses; as a fluid staple of daily consumer diet, and as an ingredient

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* The record of the promulgation of Order 4 is Joint Exhibit 1 of the record on appeal. See also JA 309.

in manufactured dairy products such as butter and cheese. Milk used in the consumer market has traditionally commanded a higher price, even though it is of no higher quality than milk used for manufacture. While cost differences account for part of the discrepancy in price, they do not explain the entire gap. At the same time [the] milk industry is characterized by periods of seasonal overproduction. The winter months are low in yield and conversely the summer months are fertile. In order to meet fluid demand which is relatively constant sufficiently large herds must be maintained to supply winter needs. The historical tendency prior to regulation was for milk distributors, 'handlers', to take advantage of this surplus to obtain bargains during glut periods. Milk can be obtained from distant sources and handlers can afford to absorb transportation costs and still pay more to outlying farmers whose traditional outlet is the manufacture outlet. To maintain income, farmers increase production and the disequilibrium snowballs."

Thus, different prices for different utilization and seasonal overproduction are two of the principal problems to be solved by a milk order. These problems are compounded by varying local practices and conditions. For this reason, milk orders are not identical, but are designed to meet the needs of the market to be regulated.

A. Utilization Differential

In attacking the problem of differing prices to producers for different utilization, the Act requires that all producers be paid a uniform price for their milk by the handler (7 U.S.C. 608c. 5B). The Act enables the Secretary to accomplish uniform prices through either individual handler pooling (7 U.S.C. § 608c(5)(B)(i)) or market wide pooling (7 U.S.C. § 608c(5)(B)(ii)).

Both pricing systems are dependent upon all milk in the pool being classified on the basis of its actual utilization with different prices charged handlers on milk going to each class of utilization. In Order 4 there are two classes; Class I, fluid milk, requiring the higher price, and Class II, primarily dairy products, the lower price. The pool will be larger or smaller depending on how much of the producers' milk a handler is able to sell as Class I. The class prices received by the handlers for the producers' milk are announced each month and are dependent upon a formula set forth in the order which the Market Administrator applies. An order can utilize a number of different methods to arrive at the prices payable to producers. Order 4, in common with almost all present-day milk marketing orders,* provides for a marketwide pool. Under this system the difference between the price paid to the producer as an estimate of the producer's share of the pool and the actual prices payable to producers when the uniform pool price is determined is adjusted through the use of a producer-settlement fund administered for Order 4 by its Market Administrator, who has the status of a federal agency (7 U.S.C. 610).

Those handlers whose obligations or payments to producers are less than the value of their actual milk utilization pay the difference into the fund. Handlers who have paid producers an amount in excess of the value of the milk's utilization are repaid out of the fund.

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* There are at present 62 federal milk orders, of which 57 employ marketwide pooling and 5 employ individual handler pooling.

B. Seasonal Fluctuations

This pricing technique operates under Order 4 in conjunction with Base-Excess provisions designed to encourage producers to offset usual seasonal fluctuations in milk production by adjusting their production to the market's needs. Base-Excess plans are expressly authorized by 7 U.S.C. § 608c(5)(B)(d). This is but one of the approaches available to the Secretary to deal with the problem of equating seasonal variations in production with the constant needs of the regulated market. He may include a Louisville plan as was done in Order 2 under 7 U.S.C. § 608c(5)(B)(e). He may attach seasonal controls to a Class I base plan under 7 U.S.C. § 608c(5)(B)(f) as was done, for example, in (the Puget Sound marketing area) (7 C.F.R. 1124, *et seq.*).

He may, of course, make no provision at all in an order for such seasonal considerations; see, for example, Order 132 (7 C.F.R. 1132.1 *et seq.*) which regulates milk handling in the Texas Panhandle marketing area.

Authority for Base-Excess plans has been contained in the Act since its inception. In 1965, the Act was amended to provide that milk orders may also have Class I base plans. In 1970, Class I base plan authority was continued and extended and authority for Louisville plans was first specifically expressed.*

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* The 1970 amendment has been summarized in an annotation to the United States Code annotated, on page 82 of the Cumulative Pocket Part for use in 1972, as follows:

> "Subsec. (5)(B). Pub. L. 91-524 retained and separately stated the existing authority for base-surplus or base-excess provisions in milk marketing orders in cl. (d), clarified and reaffirmed, in cl. (e), the authority for plans under which leveling of spring and fall production is encouraged by withholding from sums paid for milk in the spring and subsequently paying the same sums to producers in the fall and, in cl. (f), extended the authority for Class I Base Plans. . . ."

Base-Excess, Louisville, and Class I base plans are distinct approaches which are separately authorized by the Act in its present form. Furthermore, the details of each plan as incorporated in an order vary in accordance with the problems confronting the market to be regulated.

In attempting to obtain the optimum prices for the milk of their members, cooperatives such as appellant seek to place as much milk as possible with the highest paying outlets. Marketing areas regulated by federal milk orders often draw milk from similar sources. Order No. 2 regulating New York and New Jersey and Order 4 regulating the Middle Atlantic regulate adjacent markets and large cooperatives such as appellant have customers in both. Whether one order or the other controls is dependent upon the terms of the orders, both of which consider the percentage of milk disposed of by a handler in a regulated market as a criterion.

An essential difference between Order 2 and Order 4 is that whereas Order 2 utilizes a Louisville Plan to effectuate seasonal adjustments in production in accordance with the market's needs, Order 4 utilizes a Base-Excess plan for the same purposes.

Under a Base-Excess plan, the record of each producer's milk deliveries to the regulated market during the months when milk production is normally the lowest is the basis for calculating the average daily pounds the market received from him during that period. That figure is the producer's daily base. All milk received on a given day from a producer by a pool handler in excess of his daily base is excess milk. In calculating the prices actually payable to a producer or his cooperative on milk received by pool handlers during periods when base and excess prices apply, the total amount of all milk received by all pool handlers in excess of available base during the month is calculated. This amount is multiplied by the Excess

Price (which in Order 4 equals the Class II price) and this total is deducted from the total value of all milk utilized by the market. The remainder equals the total value of all base milk which, when divided by the total volume of base milk, gives the base milk price which is, therefore, a blended or average price.

Under a Louisville Plan, a given amount is deducted from prices otherwise payable to producers whose milk is delivered to the market during the flush spring and summer months of over-production to maintain a fund which is used to add to the prices paid producers during the fall and winter months of undersupply.

Under the Louisville Plan of Order 2, all producers delivering to the market during the fall and winter months receive the added increments irrespective of whether they previously delivered to the market. Under any Base-Excess plan, including Order 4's, those who fulfilled the market's needs during the period when milk is in short supply are compensated by receiving the benefit of higher base milk prices during periods of glut. The differing benefits and detriments afforded by Louisville Plans and Base-Excess plans, particularly when one market has the one and is adjacent to a market with the other, can lead to much disruptive shifting of milk by producers and their representatives in an attempt to derive the maximum benefits of both.

Such was the case with Order 2 and the three orders that were merged into Order 4 in 1970. Each of the three antecedent orders, covering Philadelphia, Washington and Baltimore, employed Base-Excess plans. Two utilized a four-month period during which base and excess prices were applicable. The other utilized a three-month period. Otherwise, the provisions of all three were quite similar.

When hearings were conducted by the Secretary of Agriculture's representatives on the issuance of the new order to regulate the merged area regulated by the three predecessors, a prime consideration was the determination of the most appropriate provisions to include in the new Order 4 to effectuate leveling of seasonal production. A matter of particular concern stressed by the cooperatives serving the market to be regulated by the new order was how could the problems that had afflicted the existing orders resulting from disruptive shiftings of milk from the Order 2 market to gain the advantages of both plans while avoiding the obligations of either, be avoided? In his final decision published in the Federal Register on May 22, 1970, the Secretary reviewed this problem and the reasons underlying his decision to utilize a 12-month Base-Excess plan to meet it (35 F.R. 7924, 7936-7938):

> "(d) *Seasonal incentive payment plan,* The merged order should provide for the payment to producers under a "base and excess" plan as a means of encouraging a continuing uniform level of production throughout the year.
>
> Each of the respective orders presently provides a base-excess payment plan whereby bases are computed on deliveries in the months of July through December and are applicable for the months of March through June, except Washington, D.C., under which bases are applicable only for the three months of April through June. Each of the orders provides very liberal base transfer rules and, in addition, dairy farmers delivering milk to any plant which first enters the market after the beginning of any base-forming period may acquire bases computed as though such plant had been a pool plant throughout the base-forming period.
>
> Because of the ease with which transfers can be accomplished under the current orders and because

dairy farmers can earn full bases, even though the plant to which their milk is delivered is pooled as little as a single month, there has been considerable abuse of the base-excess plan, particularly under the Delaware Valley order.

* * * * *

These numerous abuses of the base plan, which in many situations were also abuses of the Louisville plan under either Order 1 or 2, have resulted in considerable discontent on the part of many producers in the Delaware Valley market.

A proposal for a Louisville payment plan was made on behalf of the Dairymen's League Cooperative Association, Inc. (now Dairylea Cooperative. Inc.) and Northeast Dairy Cooperative Federation, Inc. Both of these organizations are major cooperatives under Order 2 and Dairylea also has substantial membership among Order 4 producers.

* * * * *

Both the base-excess plan and the Louisville seasonal incentive pricing plan obviously can be effective in production in any particular market. Although both plans have wide acceptance, the plan provided in any particular market should be one which has the approval of a substantial majority of producers in such market. The cooperatives representing such a majority of the producers in the markets heer being merged support a base-excess plan.

* * * * *

The base and excess plan herein adopted would establish a base for each producer by dividing his total deliveries to pool plants in the preceding months of August through December by 153 (154 in the case of a producer on every-other-day delivery and who delivered on August 1) less the number of days, if any, for which such producer's production was not

received by pool handlers, but und r no circumstances by less than 120. Producers would establish new bases each year. Such bases would be computed by the market administrator to be effective for the 12-month period of March 1 through February of the following year.

* * * * *

Under the transfer rules hereinafter discussed, there will be but limited opportunity for new producers to acquire bases by transfer. *Appropriately, therefore, some provision should be made whereby new producers can acquire bases reflecting their performance in the market.* Otherwise, new producers might be deterred from entering the market.

Pennmarva initially proposed that a new producer might acquire a base equal to 50 percent of his deliveries each month until such time as he had delivered four months during the next following base-forming period. In its posthearing brief, however, proponent suggested that the 50 percent apply only to the months of March through June, that 60 percent apply in the months of January, February, July and December and that 70 percent apply in the remaining 4 months of August through November.

It is concluded that the latter percentages will provide reasonable treatment for new producers and that no further provision is needed for the purpose of providing interim bases. Bases computed on these percentages would not appear to be so high as to encourage new producers to come on the market at a time when their milk is not needed for Class I purposes. At the same time, they would not be so low as to discourage any producer who intends to become permanently associated with the market.

To insure equity between established producers and new producers, provision must be made whereby

a producer with an established base can give up such base by notification to the market administrator and have a new base computed each month on the same percentage as is applicable to new producers. Once a producer relinquishes his established base, he must have his base computed each month on a percentage basis until the following March when new bases become applicable." (emphasis supplied).

As stated above, the point of these plans is to encourage producers to market more milk in the fall when the supply is short. The Louisville plan (Order 2) does this by deducting money from the price paid to producers in the spring and paying out in the fall. The base-excess plan (Order 4) provides for a lower price to be paid in the spring for so much of any producer's milk as exceeds the amount he produced the previous fall. Thus, the more milk a producer under Order 4 markets in the fall, the short season, the more for which he will receive the higher price in the spring, the flush season.

The provisions of the two milk orders, which govern contiguous areas, work together to ensure an adequate supply to both markets. Naturally, it would be desirable for Order 4 producers to market milk under Order 2 in the fall during the payout period, as the money is paid whether or not the producer participated in the spring when the sums were deducted. This artificial market pressure is offset by the similar desirability of marketing in Order 4 in the fall in order to build up a base.

The same situation occurs during the pay-in periods under Order 2, the spring months. Order 2 producers, to escape the deductions from their price, can market under Order 4. But, of course, to get the higher base price they must have built a base by marketing in Order 4 during the fall months when Order 2 was paying out.

Although it was not necessitated by any provision in the Act, the Order 4 producers and the Secretary determined an equitable system to provide for the Order 2 producer who wished to market in Order 4 during the spring months but had not built up a base by marketing in the fall.* The system adpoted was a proposal for a 50%, 60% and 70% base described in the final decision of the Secretary quoted at length immediately above (7 C.F.R. 1004.92e). This was done even though the prices in Order 4 tend to be slightly higher than in Order 2 over the long run (JA 311). This section, which provides a base for new producers entering the market, is the subject of this lawsuit.

Statement of Facts

This case arose because of Dairylea's decision to sell larger amounts of milk to one of its clients marketng milk in the area regulated by Order 4. By so doing, the milk formerly regulated by Order 2 became regulated by Order 4 (JA 307). Although all of the milk sent to the Order 4 customer was milk produced by its members, part, commencing in May of 1972, went directly from the farms to the customer's plant, and the rest, commencing in October of 1972, went first to a plant operated by Dairylea and was then sent on to the customer (JA 307-8). In the latter situation, Dairylea's plant sent substantially all of its milk into Order 4 instead of to the Order 2 market and, pursuant to the terms of the orders became an Order 4 supply plant and no longer a plant pooled under Order 2. In short, milk that had been regulated by Order 2 became subject to Order 4.

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* Appellant confuses this grant of bases to new producers with the restrictions on new producers authorized by the Act. 7 U.S.C. 608c(5)(D). The restrictions authorized by that section were not used in Order 4. See Point III B *infra.*

As Dairylea had been marketing in Order 2 during the Order 4 base building period, the milk came in as milk from a new producer until milk was marketed during the fall months and a base built (JA 307). Instead of having no base at all and receiving only the excess price, the Order provides for a designated base until an actual base is built. 7 C.F.R. 1004.92(e). This base ranges from 50% in the flush months of March through June to 70% in the short months of August through November. Dairylea here challenges this temporary provision of an arbitrary base, saying the base should be calculated on milk marketed in the fall months under *any* order. By this reasoning, a handler, such as Dairylea, having marketed in Order 2 during the desirable payout period would be treated as having simultaneously built up a base for the advantageous price treatment under Order 4, thereby frustrating the purposes of both Orders.

Statement of the Case

This action was commenced by summons and complaint dated November 1, 1972. By order dated December 29, 1972, Pennmarva was allowed to intervene. Pursuant to the stipulation of the parties, a trial was held before the Honorable Robert L. Carter on January 23 and 24, 1973. Judge Carter's opinion dismissing the complaint was filed November 19, 1973, reported at 366 F. Supp. 1335 (1973).

ARGUMENT

POINT I

The District Court lacked jurisdiction over the subject matter of the complaint.

Dairylea is a handler (JA 344-5).

The statutory scheme provides for administrative review of claims by handlers that the provisions of a market order are illegal. It is undisputed that Dairylea did not initiate, far less exhaust, this administrative remedy.

> Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provisions of any such order or any obligation imposed in connection therewith is not in accordance wtih law and praying for a modification thereof or to be exempted therefrom. . . . (7 U.S.C. 608c(15)(A)).

The ruling of the Secretary is then subject to judicial review:

> The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court

> shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. (7 U.S.C. 608c(15)(B))

This procedure assures that initial fact-finding will be conducted by the Department of Agriculture in order that the determination of the validity of federal milk orders will have the benefit of the Secretary of Agriculture's expertise. As stated by the Supreme Court in *United States* v. *Ruzicka,* 329 U.S. 287, 294 (1946):

> ". . . whether . . . an order is or is not in accordance with law is not a question that brings its own immediate answer, or even an answer which it is the familiar, everyday business of courts to find. Congress has provided a special procedure for ascertaining whether . . . an order is or is not in accordance with law. The questions are not, or may not be abstract questions of law.
>
> Even when they are formulated in constitutional terms, they are questions of law arising out of or entwined with factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture."

This doctrine, enunciated in *Ruzicka,* has been consistently followed. *United States* v. *Turner Dairy Co.,* 162 F.2d 425 (7th Cir. 1947), *cert. den.,* 332 U.S. 836 (1947); *Panno* v. *United States,* 203 F.2d 504 (9th Cir. 1953); *United States* v. *Ideal Farms, Inc.,* 162 F. Supp. 28 (D.C.N.J. 1958), *aff'd,* 262 F.2d 334 (3d Cir. 1958); *United States* v. *Yadkin Valley Dairy Cooperative, Inc.,* 209 F. Supp. 634 (M.D. N.C., 1962), *aff'd per curiam,* 315 F.2d 867 (4th Cir. 1963). *United States* v. *Sunny Ayr Farms Dairy, Inc.,* 323 F. Supp. 825 (E.D. Pa., 1971). *Inter-state Milk Producers' Cooperative, Inc.* v. *St. Clair,* 314 F. Supp. 108 (D.C. Md., 1970); and *Rasmussen* v. *Hardin,* 461 F.2d 595 (9th Cir., 1972).

This procedure for administrative and judicial review for handlers is the sole statutory mechanism for judicial review of the Act and the orders entered pursuant to it. Absent compliance with section 15(A), there is no subject matter jurisdiction for review under section 15(B).

Appellant, however, argues that it is exempt from the requirements of the exhaustion doctrine because it has brought suit solely on behalf of its member-producers. Historically, producers were not viewed as having rights under the statute. *Stark* v. *Wickard,* 321 U.S. 288 (1944). *United States* v. *Rock Royal Co-op,* 307 U.S. 533 (1939). 7 U.S.C. 608c(13). Handlers which sought to assert "producer" rights in section 15(A) proceedings were denied administrative review. *In re Producers Creamery Company of Springfield,* 23 A.D. 515 (1967); *In re Barron Coop. Creamery, et al.,* 10 A.D. 305 (1951).

Counsel for the Secretary stated in the Court below that the Secretary had altered his position and was prepared to waive any procedural objection he might have to a petition for a 15(A) review (JA 35-36). The District Court having found that the Secretary's waiver of objection to administrative review was without "legislative authority" (JA 376), it concluded that the exhaustion doctrine was inapplicable. In this respect, the District Court erred. The Secretary's altered position was not only permissible as a matter of statutory interpretation *Stark* v. *Wickard, supra,* but also mandated by the present law of standing, which has been "revolutionized" in the last few years. *Worth* v. *Seldin,* — F.2d — slip op. 2937, 2942 (2d Cir., decided April 18, 1974). In *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, 152-153 (1970), the Supreme Court established a two-pronged test for standing; the plaintiff must allege an "injury in fact" and must seek to protect an interest "arguably within the zone of interests to be protected or regulated by the statute * * * in question." Where, as here, the producers represented in the

Dairylea Cooperative have alleged economic harm as a result of the challenged market order and are the object of the Secretary's regulation and of the Act, the Secretary's decision to permit administrative review cannot be characterized as "unauthorized"; in fact, his adherence to his earlier position might well have been successfully challenged* in a mandamus proceeding.

As this Court has recently observed,

> "the doctrine of exhaustion of administrative remedies is subject to exceptions, and '[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved.' *McKart* v. *United States*, 395 U.S. 185, 193 (1969). Among the purposes for the doctrine that the Supreme Court recited in *McKart* are avoiding premature interruption of the administrative process, allowing the agency to develop the necessary factual record, giving the agency the first opportunity to exercise its discretion or to apply its expertise, and promoting efficiency by letting the administrative process carry through to its conclusion. *Diapulse Corporation* v. *Food and Drug Administration*, — F.2d —, slip op. 3385, 3390 (2d Cir., decided May 4, 1974).

Each of the foregoing objectives of orderly administrative action would have been served by an initial declination of jurisdiction by the District Court. The confusion of the proceeding below, which was compounded by testimony duplicative of the administrative hearing (JA 148-151, 214-215) convincingly demonstrates that this was not one of

* For purposes of this argument only, the Secretary assumes the truth of Dairylea's allegations concerning its representative capacity and the interests it sought to protect. The argument is addressed to the question of whether the District Court should have dismissed the action pursuant to Rule 12(b)(1), F.R. Civ. P., not whether the District Court should have found these allegations to have been established at trial.

those rare instances in which *de novo* District Court review of the Secretary's findings was warranted, e.g., *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 419-420 (1971), nor were any factors present justifying circumvention of the exhaustion rule. *McKart* v. *United States, supra.* In the recent case of *In re Lehigh Valley,* AMA Docket Number M 2-31, an Order 4 cooperative instituted a 15(A) proceeding to challenge the operation of Order 2's Louisville Plan. The Secretary made no challenge, as had been made previously, to either standing or justiciability. A hearing was held and a recommended decision entered by the administrative trial judge.

The administrative decisions cited by appellant below are distinguishable on a number of other grounds. For purposes of this action, it suffices to distinguish them in time.

The statute requires that a handler asserting that a section of an order is unlawful must pursue an administrative remedy prior to instituting suit in the District Court. 7 U.S.C. 608c 15(A), (B). In the identical situation to the case at bar a cooperative recently challenged the seasonal fluctuation plan in Order 2 in a proceeding pursuant to section 15(A) before the Secretary's designate. *In re Lehigh Valley, supra.*

In the absence of such a section 15(A) proceeding, this Court lacks jurisdiction over the subject matter of the action. *United States* v. *Ruzicka,* 329 U.S. 287 *supra.*

Appellant proposed below that administrative review could be avoided by reliance on *Stark* v. *Wickard, supra,* a Supreme Court decision which dealt with the narrow circumstance, unforeseen by Congress, of a producer and a handler at odds with each other.

In *Stark* the producers were complaining of a payment made out of the producers' fund to the cooperatives themselves. Any review that could be obtained by a handler cooperative on behalf of the producers would obviously be inadequate, as the producers and the cooperative were on opposite sides of the fence. 321 U.S. at 301.

> "When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, *at any rate in the absence of an administrative remedy,* not to be construed as a denial of authority to the aggrieved person to appropriate relief in the federal courts in the exercise of their general jurisdiction." 321 U.S. at 309 (emphasis supplied).

In *Stark* there was no administrative remedy because *producers,* not handlers, had brought the action, the producers having been forced into this unusual posture because of the unforeseen circumstance of a producer claim *against* a handler. Usually, of course, the handler acts on behalf of the producer and obtains the statutorily provided review, just as the handler obtained review on behalf of the producers in *In re Lehigh Valley, supra,* so also the handler here seeks review on behalf of its producer members.*

This case is not the first time that a cooperative has tried to use *Stark* as a means of avoiding the administrative

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* A recent decision in the district court of Maryland proposed, *per dictum,* that producers might themselves assert their own rights, now that such rights are recognized. *Inter-state Milk Producers Cooperation, Inc.* v. *St. Clair,* 314 F. Supp. 108, 111 (D. Md. 1970). This issue has yet to be presented to a court and certainly is not presented here. Judge Carter's reliance on an analogy to this hypothetical in the Maryland Court's *dictum* is misplaced (JA 345-6). Indeed, the court in *Inter-City* dismissed for failure to exhaust the administrative remedy.

proceeding. In *Rasmussen* v. *Hardin*, 461 F.2d 595 (9th Cir. 1972) an action instituted by a producer-handler was dismissed for failure to exhaust his administrative remedy. A producer-handler is a producer who distributes and sells his own milk production and, in short, has a dual status similar to that of plaintiff, which is both a bargaining agent for producers and engaging in handler functions.

Stark v. *Wickard*, was relied upon by the plaintiff in *Rasmussan*. The Court, however, distinguished *Stark* on the grounds that whereas the producers had no remedy available to them in *Stark*, *Rasmussan* as a handler, would have a remedy, and accordingly, that remedy was exclusive.

The acceptance of jurisdiction by the District Court, whatever the outcome on the merits, provided a precedent which would completely foreclose the administrative agency which has primary responsibility for milk marketing from *any* participation in the review of the Orders which it administers. This was not the intent of Congress when it passed the Act nor the intent of the Supreme Court in deciding *Stark*. Since the District Court was without subject matter jurisdiction, this Court should affirm the dismissal of the complaint without reaching the merits of the controversy.

POINT II

The New Producer Provisions of Order 4's Base-Excess Plan are Reasonable.

There is authorization in the Act for three different systems to alleviate seasonal fluctuations; base-excess plans, the Louisville plan and Class I base plans. 7 U.S.C. 608 C(5)(B) ii(d), (e) and (f) respectively. Both the base-excess plans and the Class I base plans have a number of variations, e.g. a four month base-excess plan as opposed to a twelve month base-excess plan. Order 4, as

promulgated by the Secretary of Agriculture and voted upon by the producers, contains a twelve month base-excess plan. As of 1971 this same choice had been made in three other Orders, 7 C.F.R. 1007, 7 C.F.R. 1124, and 7 C.F.R. 1040. The distinctive feature of such a plan, and the feature which has led to this litigation, is the time gap between an act which must be performed and the realization of the benefit granted for performance of the act.

Milk consumption is more or less uniform throughout the year, the variations occurring within each week according to shopping patterns. Milk production is not uniform. Milk, however, is perishable and can only be kept in reserve for short periods of time. Hence, to meet demands for fluid or Class I milk, it must be produced and marketed steadily throughout the year with special incentives for marketing in the fall when nature is at an ebb, and some discouragement of marketing in the spring, when natural production is high. Finally the facts of bovine life require that off-season production be planned well in advance.

Oversupply of milk results in waste or increased Class II, dairy product, usage; undersupply results in demand that cannot be met and higher prices. Thus the provisions of a milk Order must not only encourage milk supply in the fall and discourage it in the spring but encourage a steady, predictable supply throughout all twelve months of the year.

As stated in the Act:
7 U.S.C. 602. It is declared to be the policy of Congress—

* * * * *

> (4) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608(c)(2) of this title *as will provide, in the interests of producers and con-*

sumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices. [Emphasis Supplied.]

Both purposes are accomplished by the Order 4 base-excess plan.

The Order 4 Base-Excess Plan

The first problem addressed by the Secretary was to encourage milk production during the short supply months. This was solved by granting the producer a higher price in the following spring months for so much of his milk as equals the quantity of milk that he marketed during the base-building months of August through December. The greater the producer's base, composed of the amount marketed in the fall, the greater the benefit he will later receive.

This benefit begins on the following March 1. From this point, the producer will be paid a higher price, the base price, for all milk he markets under Order 4 up to but not beyond the amount he was marketing in the fall months. During the month of high natural production there is no benefit to be gained by oversupplying the market since all milk over the base amount gets a lower, or excess, price. The benefit continues for twelve full months including the following August through December when the producer is building a new base for the next year.

Thus, the plan encourages increased production for the fall months while at the same time encouraging steady, predictable production for the rest of the year.

Because of the necessity of a start-up period, i.e., the requirement of marketing in the fall before the better price is obtained, the new producer entering the market will not have a base until he has participated during the base building months. To ease the new producer's entry while at the same time maintaining the incentive both to market

in the fall and stay with the market, Order 4 grants the new producer an interim base as follows:

January, February	— 60%
March - June	— 50%
July	— 60%
August-November	— 70%
December	— 60% (7 C.F.R. 1004.92)

As can be seen, new producers, like continuing producers, are encouraged most in the fall and least in the spring. At the same time, the new producer provisions maintain the desirability of participating in the plan by building a high base in the fall and then continuing to supply the market throughout the year.

This last consideration is very important. Milk markets in the populous northeast are small, and, depending on the location of the producer, there is little difficulty involved in shifting from one Order to another as it would benefit the producer. Such shifting back and forth both exacerbates the seasonal differentials and causes unpreditable over- or under-supplies during the other months.

The point of a base-excess plan is to reward participation in the fall with a benefit throughout the rest of the year. Were new producers, at any time they chose to market in Order 4, to receive the full benefit, without the performance which earned the benefit, the plan, authorized as it is by the Act, would be meaningless. Yet that is just the relief sought by appellant.

If new producers are granted the average historical base of approximately 90% which reflects the sale of milk in an entirely different market, then there is no incentive either to build a base to help the market in the fall or to stay with the market at any time. The base-excess plan would be ineffective and the market supplies unpredictable.

If new producers had been granted an interim base calculated from their marketing history in another Order, they would have had the best of all possible worlds. They could market in the fall under Order 2, during the Louisville plan pay-out period. They could then avoid the Louisville plan pay-in period by bringing their Order 2 base down into Order 4 in time to reap the benefits of the base-excess plan. This proposal benefits the new producer at the expense of *both* marketing areas.

Nor is a four-month base-excess plan instead of a twelve-month plan the answer. As Dr. Hand testified, the actual experience with such a plan, which was previously in effect in Philadelphia, one of the markets merged in the present Order 4, was to encourage disruptive shifting back and forth among markets (JA 251-3, 270). In addition, it was necessary to coordinate this new order with Order 2's Louisville plan (JA 280-1). This is best accomplished with a twelve-month plan, either the 12 months base-excess or Louisville plan (JA 293-4).

Finally, there is the alternative of a Louisville plan. The Secretary of Agriculture, in promulgating the Order, stated that such a plan "obviously can be effective in production in any particular market." 35 F.R. 7924 at 7937. No party contradicts that. However, the Act leaves the choice among equally authorized plans to the Secretary and the producers in the geographic region covered by the order. 7 U.S.C. 608c(1)(4)(8) and (19). Dairylea itself proposed such a plan for Order 4 (Joint Exhibit 1, p. 1212 and testimony of Chester Smith, Joint Exhibit 1, Vol. III), without success.

It should be noted that actual experiences under the present Order 4 with a twelve month base-excess plan, and the present Order 2, with a Louisville plan, have shown the base-excess plan to be more successful in improving the seasonal pattern of production (JA 281). This accords with

the experience of one of the markets which was merged into Order 4. The market had had a Louisville plan for a short time and found it disappointing (JA 281).

A. The Trial Testimony Supported the Reasonableness of the New Producer Provisions of Order 4

The necessity for some sort of plan to deal with the purely seasonal production differentials is not at issue. Indeed, a choice of three such plans is authorized by the Act. The ill effects of marketing without a seasonal plan were explained by Pennmarva's witness, Dr. Paul Hand. (JA 261).*

Dairylea's witness, George O'Brien, testified as to the necessity of plans to control seasonal production (JA 118-9). It was his testimony, however, that the benefits inure primarily to the large cooperatives who realize savings on equipment and facilities where supplies are steady (JA 120-1).

Dr. Hand testified as to the necessity of having steady supplies throughout the year. To the extent that production is steady the consumer demands are met (JA 245-246) and income to producers is improved (JA 248). This, of course, is the purpose of a twelve-month base-excess plan as opposed to a four month or six month plan (JA 252-3, 293-4).

Dr. Hand's testimony dealt also with the problem of producers shifting in and out of the market in the absence of some performance requirement (JA 252-3). It was his testimony that without such a production requirement, the producers would shift in and out of Order 2 and Order 4 to take advantage of each of the seasonal plans (JA 253, 224).

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* The Government argued unsuccessfully below that a *de novo* trial was inappropriate in a proceeding for judicial review of an administrative action. *Universal Camera Corporation* v. *Labor Board,* 340 U.S. 474 (1951).

He further testified that every milk marketing order included some performance requirement (JA 251).

Plaintiff actually presented very little testimony at trial to support the proposition that the provisions for new producers are unreasonable. The bulk of Mr. O'Brien's testimony was to demonstrate the financial difference between the price paid for the milk which was marketed under Order 2 at a 70% base and the price that would have been paid if the base were calculated from the producers' production for the previous fall (JA 70). What this extensive testimony understandably fails to emphasize is that these "historical bases" represent milk marketed in Order 2, milk which is wholly irrelevant to supply or market conditions in Order 4. As this is the crux of plaintiff's damage calculations, it is the crux of his case, i.e., new producers should be given an interim base calculated from milk they market anywhere. As we have pointed out, *supra,* this would emasculate the entire base-excess plan. Any producer who is so located as to be able to ship into different markets can market milk anywhere the price is right, step back into Order 4, bringing an irrelevant base with him, and reap the rewards. This, of course, at the expense of producers not so fortuitously placed and the detriment of the market itself.

Another weakness in Dairylea's case on damage suffered emerged when Mr. O'Brien admitted on cross examination that the producers themselves were, in fact, paid the Order 2 blend price for their milk, no matter where it was marketed (JA 185-7).

Mr. O'Brien's final point was that the twelve month aspect of the base-excess plan was unnecessary and resulted in what he called supply management (JA 136-8). In his opinion, because only excess price is paid for so much milk as exceeds what the producer marketed in August through December, it would inhibit the purchase and use of labor saving devices which increase production (JA 137). Of

course, this increased production would be reflected in a higher base for the period of August through December, which would be to the producer's advantage. And even Mr. O'Brien concedes that it is desireable to discourage production in the flush season (JA 137). To argue that a producer would not purchase equipment for increased productivity because his increased profit would be slightly less for a few months of only the first year of use is not very persuasive.

Mr. O'Brien also testified that, in his opinion, a twelve month plan tends to limit entry (JA 137). Again it is desirable to limit entry in the flush months. Under the Louisville plan in Order 2 a deduction is made from all producers, new and old, during those months. Similarly, under Order 4 new producers are encouraged to come in during August through December because this is when they build their base. So we are left with a possible discouragement during only three months of the year. When balanced against the advantages of maintaining steady supplies and encouraging year round participation in the market, this point is hardly persuasive either. It might also be noted that there was no proof that such limiting effect actually happens. Indeed, this very case rests on the fact that new producers did enter the market.*

Appellant, which bore the burden, simply failed to present any evidence which demonstrated that the new producer provisions are unreasonable.

B. The Administrative Record Supports the Reasonableness of the New Producer Provisions

Dr. Hand's trial testimony which lent support to a twelve month base-excess plan accorded with the testimony he gave at the promulgation hearings (Joint Exhibit 1, Vol. V).*

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* See Point IV, *infra*.

** The other steps in the promulgation process are noted at JA 309; the promulgation record is Joint Exhibit 1.

There, testimony was received on three proposals to effectuate seasonal adjustments in the production of milk. The proposal for a 12-month base-excess plan, the plan adopted, was supported by testimony from Dr. Paul Hand (Joint Exhibit 1, pp. 711-783 and pp. 920-931); Mr. Lester C. Jones (Joint Exhibit 1, pp. 932-954); Mr. Willis Greaser (Joint Exhibit 1, pp. 954-960); Mr. Donald Dell (Joint Exhibit 1, pp. 960-967); Mr. Earl B. Crove, Jr. (Joint Exhibit 1, pp. 968-974); Mr. Paul R. King (Joint Exhibit 1, pp. 974-977).

The proposal by Dairymen's League (predecessor to Dairylea) for adoption of a Louisville Plan was supported by the testimony of Mr. Albert J. Kanya (Joint Exhibit 1, pp. 1209-1240) and Mr. Chester W. Smith (Joint Exhibit 1, pp. 1295-1370).

The witnesses expressed near unanimous concern over the problems caused by producers shifting from Order 2 to Order 4 on a temporary basis, to take advantage of the higher base prices of Order 4 in the spring then returning to New York in the fall to obtain higher prices under its Louisville Plan. The proposals for a 12-month base-excess plan, a Louisville Plan, and providing more restrictive definitions under the existing base-excess plan were each justified in part as an appropriate method of dealing with this problem. (Joint Exhibit 1, pp. 717, 1233, and 1388-9).

The thrust then of all the proposals was to effectuate a pricing system that would encourage producers to coordinate their milk production with the seasonal needs of the Order 4 market, without attracting milk not regularly associated with the market to the Order 4 market during those seasons when production is flush and milk is in over-abundance. The proposal adopted by the Secretary was the 12 month Base-Excess Plan which discourages the latter practice by requiring a producer to have shipped milk to Order 4 during the months of shortage in order to be paid full base prices.

The reason the Secretary chose the 12 month Base-Excess Plan over the other proposals was succinctly stated by him in his decision:

> Both the base-excess plan and the Louisville seasonal incentive pricing plan obviously can be effective in promoting a desirable seasonality of production in any particular market. Although both plans have wide acceptance, the plan provided in any particular market should be one which has the approval of a substantial majority of producers in such market. The cooperatives representing such a majority of the producers in the markets here being merged support base-excess plan. 35 F.R. 7924, 7937.

The Secretary followed the requirements of the Act for his issuance of a decision. It was based on "substantial evidence." *Universal Camera Corporation* v. *Labor Board,* 340 U.S. 474 (U.S. 1951). It was a 'reasoned decision." *United States* v. *Mills,* 315 F.2d 828, 834. (4th Cir., 1963) *cert. denied* 375 U.S. 819. The Supreme Court in *Universal Camera Corporation* v. *Labor Board, supra,* at 448 held that a reviewing court should view the agency decision in light of the entire record and may set it aside only "when it cannot conscientiously find that the evidence supporting that decision is substantial."

If appellant believes there has been a significant change in circumstances or that the Order provisions have proven themselves to be ill-fashioned to meet the needs of the market, its recourse is to request the Secretary to hold public hearings to amend the Order, as the Act provides (7 U.S.C. § 608c(3) and (17)).

As stated in *Gray* v. *Macy,* 239 F. Supp. 658, 660 (D.C. Or. 1965), *reversed on other grounds,* 358 F.2d 742 (9th Cir. 1966):

> "Generally, the reviewing court's duty is at an end when it becomes evident that agency action is based

on substantial evidence and is consistent with statutory powers. The wisdom of decision is of no concern to the court."

See, also, *Weldon Farm Products, Inc.* v. *Commodity Credit Corp.*, 214 F. Supp. 678 (D.C. Minn. 1963); *Coyle Lines, Inc.* v. *Crocker-Anglo Nat. Bank*, 263 F. Supp. 125 (D.C. Cal. 1966), and *Littell* v. *Morton*, 445 F.2d 1207 (4th Cir. 1971).

POINT III

The New Producer Provisions of Order 4's Base-Excess Plan do not violate the Act.

A. The Uniform Pricing Requirement

The Supreme Court stated in *Zuber* v. *Allen*, 396 U.S. 168, 179 (1969) that

> The foundation of the statutory scheme is to provide uniform prices to all producers in the marketing area, *subject only to specifically enumerated adjustments.* [Emphasis supplied.]

The base-excess plan is such a specifically enumerated adjustment. 7 U.S.C. 608c(5)(B)(d). The Louisville plan is similarly authorized in subsection (e) and the seasonally controlled Class I base system in subsection (f). Extensive provisions as to the treatment for new producers were specified by Congress for the Class I system in subsection (f). Congress did not, however, place any such restrictions on the base-excess plan and Louisville plan in subsections (d) and (e).

Appellant now argues that the restrictions specified for subsection (f) are "implicit" in subsection (d); that Order 4's base-excess provisions, subsection (d), have purposes similar to a Class I Base Plan, subsection (f), and should be subject to the same conditions Congress imposed on Class I base plans in subsection (f). This is not so.

Although marketwide pooling contemplates the initial calculation of a uniform blend price payable to all producers serving the market regardless of the milk's actual utilization, the calculation of such a price does not mean each dairy farmer will in fact receive the same sum of money on equivalent volumes of milk. As recognized in *Zuber* v. *Allen, supra,* the uniform price is not the actual price to the producer:

> The actual price to the producer is . . . computed by adding and subtracting [to the uniform price] certain special differentials provided for by statute and order. 396 U.S. 168, 178.

Although a price differential was successfully challenged in *Zuber* v. *Allen, supra,* the base-excess plan at issue here—unlike the differential in *Zuber*—is specifically authorized by the Act.

In no sense is appellant challenging the payment of base excess prices in place of blend prices unadjusted to meet seasonal factors. Its complaint is that it was not accorded the advantages which accrue to producers who marketed in Order 4 during the base period precisely because it had not yet marketed during the base period.

Order 4's assignment of base is changed each year in accordance with a producer's meeting the market's seasonal needs. If a producer reduces his marketings during the fall months his base in the forthcoming year will be likewise reduced. Under the Class I Base Plan authorization of the Act:

> ". . . In the event a producer holding base allocated under this clause (f) shall reduce his marketings such reduction shall not adversely affect his history of production and marketing for the determination of future bases. . . ." 7 U.S.C. § 698c 5(B)(f).

This difference in treatment of producers highlights the distinction between the two types of plans:

> 'In contrast (to base-excess plans) Class I base plans involve market rights of producers for a longer period of time. Concern centers on *annual* level of milk deliveries rather than on seasonality of production within the year." *Base Plans In U.S. Milk Markets: Development, Status and Potential,* June 1972, Marketing Research Report No. 957, U.S. Department of Agriculture's Economic Research Service, at page 5.

Order 4's Base-Excess provisions apply for one year, as has been previously demonstrated, to meet the seasonal needs of the market. This does not create personal "market rights" in farmers which carry over from year to year so as to adjust overall volumes of milk being marketed on an annual basis. Thus, the Order 4 provisions are completely distinguishable from the type of production controls authorized by clause (f). Accordingly, to attempt to take any of the conditions Congress imposed upon the use of Class I Base Plans under clause (f) and graft them gratuitously onto clauses (d) or (e) is absurd. If anything, the presence of these limitations in clause (f) and their absence in clause (d), which Congress had before it and reenacted at the very same time, indicates most strongly that Congress specifically intended that the limitations should not attach to clause (d).

B. New Producer Provisions

Appellant would also use the floor debates on these limitations upon Class I base plans as authority for its interpretation of section 608c(5)(D) of the Act, a section which pertains to pricing reductions that may apply to new producers for 90 days, but which was not used in the Order 4 provisions. The short answer is that Congressman Zwach was pressing the Committee to accept his own amendment.

As to its value as legislative history on a section of the Act passed by Congress 35 years before, case law appears uniform on this subject:

> "How members of the 1914 Congress may have interpreted the 1890 Act is not of weight for the purpose of construing the Sherman Act" of 1890. *United States* v. *Wise,* 370 U.S. 405, 414 (1962).
> "The views of a subsequent Congress form a hazardous basis for infering the intent of an earlier one." *United States* v. *Price,* 361 U.S. 304, 313 (1960).

C. Trade Barrier

> Section 608c(5)(G) of the Act states:
> No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

Since the Supreme Court decided *Lehigh Valley Cooperative Farmers, Inc.* v. *United States,* 370 U.S. 76 (1964), nearly every challenge to a federal milk order has asserted that in some sense the erection of a "trade barrier" was involved. However, trade barrier cases concern provisions which are *not* explicitly authorized by statute. The base-excess provisions of Order 2 *are* authorized by statute.

The *Lehigh* case involved a provision in Order 2 under which all who bought milk elsewhere and brought it into the New York-New Jersey area were required to make a compensatory payment. The purpose of this payment was (1) to prevent pool handlers in the marketing area who were required to pay minimum class prices for their milk from having their selling prices undercut by those of non-pool handlers dealing in outside milk purchased at an unregulated price; and (2) to prevent producers in the market-

ing area whose "blend price" depended on how much of the relatively constant fluid milk demand they supplied in a given month from having their milk which was going to premium uses displaced by outside milk with a resulting diminishment of the blend price payable to producers.

Courts which have reviewed the *Lehigh* case generally agree that its holding was limited to finding that the rate charged was excessive in amount since it did more than equalize the cost of "pool milk" and "outside milk." See *Lewes Dairy Inc.* v. *Freeman,* 401 F.2d 308, 314 (3rd Cir. 1968), *cert. denied,* 394 U.S. 929 (1968); *Fairmont Foods Company* v. *Hardin,* 442 F.2d 762, 771-2 (D.C. Cir. 1971). In the latter case, the Court stated:

> "We conclude that the Third Circuit was sound in concluding that Lehigh Valley did not strike down all compensatory payments, rather it found that the particular rate of payment was invalid."

As was recently stated by the Eighth Circuit in *Sunny Hill Farms Dairy Co., Inc.* v. *Hardin,* 446 F.2d 1124, 1131 *cert. denied,* 405 U.S. 1023 (1972), in a case involving a challenge to a location differential on the grounds that it constituted an illegal trade barrier under the Act:

> "But the differential is specifically authorized by the Act and reasonable under the circumstances of the case. It thus cannot be construed as establishing an illegal trade barrier. . . ."

Appellant, one of the largest milk handlers in the East, has encountered no trade barrier. What appellant has encountered is a minor and temporary obstacle to receiving the most favorable possible treatment at any given time regardless of the consequences to other producers in the area. This argument should be flatly rejected.

D. The "Requirement of Uniformity"

Appellant complains that the Order requires the newly entering producers to subsidize *pro tanto* the inside producers; that authorizing producers who served the market during the base forming period to request that base be allocated them on the same basis as newly entering producers violates the "requirement of uniformity." *Vaughn-Griffin Packing Co.* v. *Freeman,* 296 F. Supp. 458 (M.D. Fla. 1968), *aff'd,* 423 F.2d 1094 (5th Cir. 1970), is cited as authority.

In the *Vaughn-Griffin* case, the principal concern of the Florida District Court was with an established handler who had been serving the market and received less than a newcomer—the very opposite of appellant's complaint. More important, the Florida case pertained to a different section of the Act, section 608c(6)(C), which used the term *uniform rule* as the criterion to govern the Secretary in selecting a method of allocation for products "other than milk and its products. . . ." The section with which we are concerned, and which does apply to milk, uses instead the term *equitable apportionment.* 7 U.S.C. 608cS(B)(d). Where is the equity in affording producers who did not serve the market at the time of its greatest need benefits identical to those available to those producers whose milk was there when needed? Appellant complains of *pro tanto* subsidization; in truth, if its demands were met, established producers who faithfully served the market during its season of greatest need would be forced to subsidize Dairylea. For example, appellant claims approximately $50,000.00 a month on milk it shipped during the period October 1, 1972 through February, 1973 (JA 312). The following computation demonstrates how during a given month the base prices payable to all producers would have been reduced had appellant received what it calls its "historical" base:

Base and Excess Price Computation as Calculated by the Market Administrator

Value of milk at Class prices	$26,523,268.22
Less adjustment O.S. Receipts	21,738.97
Less 29,364,862 lbs. Excess at $5.21	1,529,909.31
Base milk value	$24,971,619.94
348,212,463 pounds Base milk ÷ into 24,971,619.94 equals base price of	$7.17137
Less reserve	.04137
Announced base price	7.13

As Calculated Using 2,757,16160/Pounds More Base Milk*

Value of milk at class prices	$26,523,268.22
Less adjustment O.S. Receipts	21,738.97
Less 26,607,702 pounds Excess at $5.21	1,386,261.27
Base milk value	$25,115,267.98
350,969,623 pounds Base milk ÷ into 25,115,267.98 equals base price of	$7.15597
Less reserve	.04597
Adjusted base price	7.11

* For an average producer delivering 1000 lbs. of milk a day, this would amount to $6.00 per month.

POINT IV

A 12-month Base-Excess Plan Does Not Limit the Supply of Milk.

Appellant's postulate that a 12 month base-excess plan discourages new producers from entering the market and is intended to reduce the amount of milk that will be delivered to the market on an annual basis with the reduction in annual volume increasing each year, can best be answered by established facts. The Puget Sound base-excess provisions (7 C.F.R. 1125, *et seq.*) had been in effect since 1956, when, in 1967, the Secretary of Agriculture was requested to consider the Order's amendment to replace them with a Class I base plan. In his decision, published on July 21, 1967 (32 F.R. 10742 and 10743), the Secretary reviewed the operation of the then existing 12 month base-excess plan:

> The proportion of base milk used in Class I has steadily declined from a high of 86.6 percent in 1952 to 49.1 percent in 1965. While the total volume of Class I use increased 25.7 percent from 1952 to 1965, deliveries of base milk increased 121.4 percent almost five times as rapidly.

It is obvious that this type of base-excess plan is not included in a milk order such as Order 4 so as to reduce the annual volumes of milk that will be marketed.

Specifically, it has not had such an effect on the Order 4 market. During the period March to September, 1972, for example, the following number of producers, as shown by the records of the Order's Market Administrator, entered into the Order 4 market (Defendant's Exh. A):

March,	72 —	169
April,	72 —	157
May,	72 —	304
June,	72 —	326
July,	72 —	346
Aug.,	72 —	456
Sept.,	72 —	498

CONCLUSION

For the foregoing reasons, the judgment of the District Court dismissing the complaint should be affirmed.

May 28, 1974

Respectfully submitted,

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V. PAMELA DAVIS,
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Form 280 A-Affidavit of Service by Mail
Rev. 3/72

CA 74-1160

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

Pauline Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 28th day of May 1974 she served a copy of the within govt's brief by placing the same in a properly postpaid franked envelope addressed:

one copy on each of the following:
1) Botein, Hays, Sklar & Herzberg, Esqs,. 200 Park Ave. NY NY 10017
2) Simpson, Thatcher & Bartett, Esqs., 1 Battery Park Plaza, NY NY 10004 (of counsel)
3) Speese, Kephart & Bongiovanni, Esqs., 617 Four Penn Center Plaza 617 Four 10 Center Plaza, Phila Pa. 19103

(One copy of brief will be picked up on 5/29/74 by messengar from Botein, Hays, etc., in accordance with their instrs.)

And deponent further says she sealed the said envelopes and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline Troia

Sworn to before me this

28th day of May 1974

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975